

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CIVIL REVISION APPLICATION No 1488 of 1996
For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgement?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

TRUSTEES OF SAIJ KELVANI MANDAL

Versus

PUNJABHAI AMBARAM

Appearance:

Mr.Mehul S. Shah Petitioners
MR VH DESAI for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 08/09/2000

ORAL JUDGEMENT

The petitioners are the original defendants, against whom the respondents herein have filed a suit, being Regular Civil Suit No.290 of 1993, in the Court of Civil Judge (J.D.), Kalol. The case of the plaintiffs in the said suit is that the plaintiffs are staying at village Saij in Swami Narayan Vas. That the houses of the plaintiffs are situated in the said Swami Narayan Vas and it is on the western side line. That there were about 13 buildings in the said line. It is the case of the plaintiffs that on the western side of their houses, on the front side of their house, there is an otla of 10

ft. width and from the aforesaid doors on the western side, they are passing to the southern side of the road and there is a strip joining the said road, admeasuring 20 ft. in width and from there, they are entering the main road, along with their cattle. It is stated by the plaintiffs in the said suit that for the last 70 years, they are in possession of the aforesaid houses and using the aforesaid strip of land. According to them, they have got easementary right so far as the aforesaid strip of land is concerned, which is abutting to the doors of their houses. According to the plaintiffs, the open land which is situated after leaving some portion of their otla or Dhalia, there is an open land on the southern side. It is the case of the plaintiffs that the school of the defendants is situated on the northern side, that the defendants have started the preparation for constructing the compound wall so as to encroach upon the plaintiffs' otla and the sheds which will result into blocking the disputed passage which the plaintiffs are using. On the aforesaid averment, the aforesaid suit for a declaration and injunction has been filed. It is prayed in the suit that the defendants be restrained from encroaching upon their property and blocking the disputed property.

Along with the suit, the plaintiffs gave application Exhibit 5 for interim injunction, restraining the defendants from making any construction in the disputed land. Exhibit 30 was also given by the plaintiffs, by which they have prayed that till Exhibit 5 is decided, the defendants may be directed to maintain status quo.

The learned trial Judge decided both the applications together and after hearing both the sides, dismissed the said application at Exhibit 5. It is pertinent to note that before the trial court, the defendants had orally agreed that in case ultimately it is found that the construction of the compound wall is not legal, they will remove the same at their own costs. The trial court, after directing the defendants to give written undertaking to that effect, dismissed Application Exhibits 5 and 30. Mr. Shah, learned Advocate for the petitioner-original defendants, has stated before this Court that such written undertaking was given before the trial court.

Being aggrieved by the aforesaid order of the trial court, passed below Exhibits 5 and 30, the original plaintiffs preferred an appeal, being Civil Miscellaneous Appeal No. 28 of 1994. The learned Extra Assistant Judge,

Mehsana, who heard the said appeal, ultimately allowed the same by setting aside the order of the trial court below Exhibits 5 and 30. The defendants were restrained from making construction of compound wall so as to block the disputed passage or encroaching upon the plaintiffs' otlas and sheds till the disposal of the said suit. The aforesaid order of the appellate Judge is challenged in this revision application at the instance of the original defendants.

At the time of hearing of this revision application, Mr. Mehul S. Shah for the petitioners stated that this Court, at the time of admitting the revision application, has already granted ad interim relief in favour of the petitioners in terms of paragraph 6(B), i.e. staying the order of the appellate court passed in Civil Miscellaneous Appeal No.28 of 1994 and, therefore, according to him when there is no injunction since 1996, i.e. when the revision application was filed and admitted, his clients must have constructed the wall or in any case, since at least from that date, there is no question of plaintiffs using the aforesaid strip of land. He further argued that, in any case, the defendants are running the school and for the purpose of privacy of the students, they are using the open land as playground and if the plaintiffs are allowed to use the land in question by creating new rights in their favour, it will seriously prejudice the safety and security of the school children. He further argued that, in any case, the plaintiff cannot play hot and cold, as, on the one hand, they are claiming ownership right in the portion of the suit property, and, on the other, they are claiming easementary rights. In his submission, an owner of the land cannot claim easementary right regarding land of his own ownership and that part of the pleading would be contrary to the provisions of the Act. He also further submitted that there is voluminous evidence on record that the plaintiffs have got alternative land for approaching the main road and that the plaintiffs are not using the suit land in question by way of easement of necessity or prescription. He further argued that even on the backside, the doors have been placed recently as per Panchnama and, therefore, they have tried to create easementary right in their favour by trying to open the door. He also further argued that, in any case, before the trial court, they have already given undertaking in writing and since there is no injunction since 1996, in the interest of justice, the trial court may be directed to expedite the suit by continuing the stay granted by this Court while admitting the revision application.

As against the aforeaid argument, Mr.Desai for the respondents has argued that the appellate court has given cogent reasons and, therefore, this Court should not interfere in revision application while exercising revisional jurisdiction under Section 115 of CPC.

I have heard the arguments of both the sides at length. It is not in dispute that this Court, while admitting the revision, stayed the order granted by the appellate court. Therefore, since 1996, there is no injunction operating and since at least from the aforesaid date, the plaintiffs are not using the aforesaid strip of land. It is not in dispute that the defendants are running the school and they have already got permission from the Government at the time when the land was allotted to them to make appropriate construction for the school purposes and permission to use the open land as a playground for the school children. Just abutting this open land there are houses of the plaintiffs. The main entrance of the plaintiffs are on the other side and on the backyard, of course, there are some doors on the side of the open land in question. However, the learned trial Judge has found at page 30 of the order that considering the order produced along with the document 21/5, no such doors were shown on the backside of the plaintiffs' houses. However, in the Panchnama, new constructed door is mentioned. From that, the trial court found that the doors in question are constructed only recently. The trial court has also considered the question about convenience and safety of the school children for the purpose of playing, etc. The trial court also found that the plaintiffs are claiming both ownership and easementary right and if they are really claiming easementary right, they cannot plead ownership. Therefore, considering the totality of the circumstances as well as considering the undertaking at Exhibit 36 given in the suit, the trial court has dismissed the application for interim injunction. The learned appellate Judge has not considered whether the doors in question which are found on the backside of the plaintiffs' houses were recently constructed or not. The appellate court is no doubt right in coming to the conclusion that when easement by way of prescription is claimed, it is not necessary to plead easement of necessity. However, it is not in dispute that when other alternative way is also available to the plaintiffs and when the appellate Judge himself has found that it may not be a case of easement of necessity, question of balance of convenience was required to be considered from that angle. On the one hand, there is a question of convenience and safety of the students at large, who are

taking their education in the school and who are using the strip of land as a playground. On the other hand, if it is merely a case of easement by way of prescription and when other right of way is available, the balance of convenience can be said to be in favour of the defendants. The plaintiffs have also suppressed the fact that they have got main door which is available as a right of way on the eastern side of their houses. The aforesaid material fact was suppressed by the plaintiffs while preferring injunction application. The learned trial Judge has also considered the aforesaid fact. However, the learned appellate court has found that even though grant of injunction is an equitable relief, and one who seeks equity, must do equity and even though the party who is supposed to state all correct facts before asking an order of injunction, suppressed material fact, the aforesaid fact was not material and material fact was not suppressed by the plaintiffs. In my view, especially when there is no injunction since 1996 and before the trial court, undertaking has also been given by the defendants at Exhibit 36, the appellate court should not have interfered with the discretionary order granted by the trial court. The appellate Judge has not considered the question of balance of convenience in its true perspective. For the purpose of safety of the school children, if a wall is required to be constructed and if the plaintiffs are able to establish easement of prescription, at that time, the defendants can be directed to remove the wall. The appellate Judge, therefore, having not considered the relevant facts and circumstances of the case, has committed material irregularity in allowing the appeal and the order of the appellate court is, therefore, required to be interfered with by setting aside the same. It is, however, clarified that whatever observations made in this order are merely tentative for the purpose of deciding the revision application and, it will have no bearing so far as the pending suit is concerned and the same shall have to be decided on its own merits and without being influenced by any of the interim orders passed either by the trial court, appellate court or by this Court and on the evidence which might be adduced by both the sides. The defendants are also directed to abide by the undertaking given by them vide Exhibit 36 and in case the suit is decreed, they will remove the wall in question at their own costs without taking any ground of equity.

Subject to what is stated above, this revision application is allowed. Since the suit is of 1993, the learned Civil Judge (J.D.), Kalol is directed to dispose of the Regular Civil Suit No.293 of 1993 as early as

possible, preferably by 30th April, 2001.

Writ of this court may be sent to the trial court forthwith for compliance.

In the result, this revision application is allowed. The order passed by the learned Extra Assistant Judge at Mehsana in Civil Miscellaneous Appeal No.28 of 1994 is set aside and that of the trial court passed below Exhibits 5 and 30 in Regular Civil Suit No.290 of 1993 is restored. Rule is accordingly made absolute with no order as to costs.

(P.B. Majmudar, J.)

(apj)